

# Constitutionalism and COVID-19 in Greece: The Normality of Emergency

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In the first wave of the pandemic (March-June 2020) Greece has been widely praised for having taken all necessary actions to contain effectively the spread of the virus. Despite the reasonable [concerns](#), [a consensus among scholars about the constitutionality of harsh restrictions on rights was reached, along with a broad social acceptance, due to the priority of health public interest and the exceptional character of the measures](#). Set by an [emergency mechanism](#), the framework of the “crisis-law” remains alive and binding, while the country is possibly entering, after the second and more lethal spike (November-January), the third wave of Covid-19.

## The Strengthening of the Executive Power and the Stress-Test for Rights

[The early-spring response of the Greek State to the pandemic came up with horizontal and in-depth limitations on fundamental rights, aiming in particular at the freedom of movement and assembly, economic freedom and the exercise of freedom of religion](#). Their legal basis mostly refers to the “necessity law” provision of Article 44 par. 1 of the Greek Constitution. Thus, social distancing measures and a nearly two-month strict lockdown have been enforced by [several Acts of Legislative Content](#) (25.02.2020, 11.03.2020, 14.03.2020, 20.03.2020, 30.03.2020, 1.5.2020, 10.8.2020). [The executive established an atypical “state of emergency”, so as to cope with the extreme situation](#), given the fact that the provision of the “state of siege” by Article 48 of the Constitution is outdated, applying only to extreme threats for Greek democracy and sovereignty. Needless to say, this “fast-track” way of legislating is a powerful tool in the hands of the government and abusing it undermines the quality of democratic procedures. Still, all “pandemic” Acts of Legislative Content found their way to the Parliament and are included in primary legislation. Greek Parliament’s operation was not seriously disturbed, except from obvious restrictions on the MPs’ and staff’s physical presence. Virtual meetings and votes took place and pandemic issues were debated twice in the Plenary between the political leaders. However, the vast majority of measures has been implemented through (joint) ministerial decisions and after consultation of the experts. Crises usually lead to the reinforcement of the executive at the expense of the other two branches. Nonetheless, no structural or permanent changes can be identified in the regulatory or the judicial system.

From March 2020 until now, civil rights are under intense pressure. During the first (March-May) and the second lockdown (November-January) the freedom of movement was the first to be curtailed and remains conditioned following an SMS authorization system [for six specific reasons](#). In addition, the government instituted

an almost unconditional curfew from 9 pm to 5 am in November. Domestic travel is actually allowed only for exclusive reasons and essential journeys (for health and business purposes, family reunification or returning to permanent residence). All non-essential stores have been shut down and only supermarkets, pharmacies and food takeaway business remained open. During Christmas holidays and until 2 January, the government encouraged the “click away” shopping method in retail stores and the operation of bookstores, hairdressers, nail salons and vehicle inspection services. Wearing a mask became mandatory in public. Education services, including primary schools, high schools and universities, have been provided only through distance learning and digital tools.

A precautionous easing of the second lockdown was attempted after the holidays. In January, all retail stores and shopping malls in the country reopened, along with hair and beauty salons and vehicle inspection services. Consumers could shop only by sending an SMS or having a written certificate. The time for shopping has been limited to two hours per day and only four customers were allowed per store of up to 100 square meters. Shops and stores in areas that are at the Covid-19 “red” risk level, operated via the “click away” method. On January 11 primary schools and nurseries reopened. However, the increasing speed of Covid-19 triggered in February a third lockdown (until the 1st of March), bearing significant restrictions, especially for the “red” areas of the country (including the region of Attica in which half of the Greek population is concentrated). The curfew that runs from 9 p.m. to 5 a.m. on weekdays begins at 6 p.m. on the weekends. Primary and secondary education have switched again to distance learning (via teleconference). Regarding the exercise of freedom of religion, only up to nine (9) people are allowed to attend ceremonies, such as weddings, baptisms, funerals, memorial services, etc.

Overall, the policy of the Greek State falls under the scope of a more or less coherent pragmatism, while the pandemic measures are continuously adjusted and adapted to the volatile epidemic data. The new National Committee of Public Health Protection related to Covid#19 is charged with designing prevention and protection measures and ensuring the recommendations by the World Health Organization and European Union health guidelines. Greece observed almost ordinary processes and rules for a few months (July-October) and then urgently returned to a softer than the first lockdown crisis management. Notwithstanding the high compliance of the people with the Covid-19 conditions, critical and controversial issues were brought up in the field of rights, particularly when the freedom of assembly and religion were at stake. The borderline restrictions on these constitutional rights of great symbolic value (for both right-wing and left-wing audiences) questioned our constitutional normalcy and at the same time our standard legal perception.

## **The Extreme Limits of the Proportionality Principle**

The government's decision to ban not only an annual protest march (commemoration of the Athens Polytechnic Uprising in the 70s), but also any gathering of four or more individuals nationwide for the four day-period, during which the anniversary is marked, [was frontally contested as a violation of Article 11 of the Constitution](#). Another prohibition was enacted some days later (the 6th

of December, a one-day ban for the same number of persons) on the occasion of the tribute paid to 15-year-old Alexandros Grigoropoulos, who was shot dead by a policeman in 2008. These temporary “blanket” bans stretched the freedom of assembly to the limits, although public assemblies are regularly allowed, if they respect social distancing and health protocols. Besides the legal justification in terms of public health interest, the government argued that the restrictions with regard to commemorative assemblies and protests were not directly related to Covid-19 measures or to the political agenda. The opposition underlined the democratic symbolism of the above-mentioned marches and the fraud of a collective liberty. [A political dispute has been disguised in a controversial constitutional matter.](#)

From a positivist standpoint, the temporary character and reasonable connection of the ban with the constitutional goal of public health seem to validate in extremis the restriction, taking also into account the context of the strict lockdown and the severity of other limitations on rights, notably on economic freedom and freedom of religion. The Constitution (Article 11) stipulates that:

1. Greeks shall have the right to assemble peaceably and unarmed.
2. The police may be present only at outdoor public assemblies. Outdoor assemblies may be prohibited by a reasoned police authority decision, in general if a serious threat to public security is imminent, and in a specific area, if a serious disturbance of social and economic life is threatened, as specified by law.

Public health has been interpreted as a substantive element of public security and the police authorities invoked the prior consultation of the National Public Health Protection Committee. Opposition parties and few constitutional scholars spotted fallacies and contradictions in the justification of the decision, claiming that the (unpublished) Committee’s opinion resulted in a general description of the pandemic data and figures and not to a concrete recommendation about the restrictions on freedom of assembly. Furthermore, they defended that the general ban for four days, knowing absolutely no exception, and the number (3) of people allowed to protest, go way beyond the limits of the proportionality test and violate the core of the right. Put simply, the implicit or de facto temporary derogation of a right has nothing to do with (fair) balancing. Strong objections were also expressed to the government’s weeklong (25 January-1 February) ban on public protests attended by more than 100 people. The police decision mentioned the pandemic, but left-wing parties and unions denounced the political motives of the measure. Eventually, the ban was defied by student demonstrations in Athens and Thessaloniki against educational reforms.

Religious gatherings have been heavily restricted since the first week of November. Churches remained closed during the second lockdown (with the exception of Christmas Eve and New Year’s holiday, under strict health conditions and social distancing) to worshipers and no outdoor public ceremonies were permitted. After 11 January, worshipers were allowed to attend church for Sunday services (according to the rules that were in place during the Christmas and New Year’s holidays). Apart from funerals, the exercise of religious beliefs was possible to the public only as an individual and private practice. The immediate reaction of the Greek Church

escalated quickly to a massive civil disobedience at the celebration of Epiphany on 6 January. On this exact day, Greek Orthodox Churches were opened to worshippers, contrary to the ministerial decision.

On a normative level, the abovementioned constitutional rights were temporarily neutralized. According to the Courts, this extreme limitation or provisory suspension of a right is likely to become an eligible option within the proportionality and the necessity test. A methodologic shift in our conception of rights could be on its way. Freedoms get stung by the back-to-back global crises (terrorism, economic crisis, pandemic) and the rule of public interest prevails in the mainstream legal culture. The flexibility of the proportionality principle ends up in a double option, like the two faces of Janus. On one hand, proportionality enhances [the resilience of the Constitution](#), its ability to receive and absorb the extreme pressures and, on the other one, it may, for that exact reason, turn into [an assault on human rights](#). The limits between legal pragmatism and constitutional outbreak in the age of Covid-19 are extremely blurred. Ultimately, it is up to the Courts to set the tone.

## **The Reserved Judicial Review of the “Pandemic” Law**

There is no sufficient data on the concrete outcome of the judicial review of the pandemic measures, as many legal actions are still pending. However, few preliminary rulings made the headlines and portray already the tendencies of the jurisprudence. The Greek Council of State performs its scrutiny in a moderate and reluctant way, refusing the suspension or the annulment of the measures. In its preliminary decisions upon the general ban of assemblies (Interim measures Committee, dec. 263/2020) and the limitations of religious freedom (Interim measures Committee, dec. 99/2020, 60/2020, 49/2020) the judicial reasoning implied crucial assumptions: first of all, the inflation of the public health interest covering practically any restriction of rights. Secondly, the application of the proportionality principle equals to a (smooth) necessity test, in which the unusual conditions of the pandemic justify the large discretionary power of the State. The legality of the debated measures is essentially depending on their temporary and exceptional character. Last but not least, the Court examines whether or not the administrative decision overcomes the legal habilitation, usually produced by an Act of Legislative Content in the terms of Article 43 par.2 of the Constitution.

[The Council of State rejected the demand for suspension of the four-days general ban on the freedom of assembly](#) advancing an innovative methodology: a comparative or contextual approach of rights. [In the footsteps of the French Conseil d'Etat](#), the Greek Court's judgement takes into serious consideration the restrictions to other rights and the general status of the lockdown. For instance, it would be a logical misjudgment to anticipate the non-compatibility of the restriction on freedom of assembly, when commercial shops and schools are closed. The argumentation of the Court slips to a mere pragmatic thesis, in order to preserve a symmetry between the exercise or the bans on rights. Finally, the reserved judicial review of the pandemic crisis-law is not only a matter of judicial strategy or constitutional

conviction but also of competence and political responsibility. [As it occurs in crises, the judge acknowledges the legislator's priority in handling the urgency and the administration's technical expertise.](#)

## The Transparency and Justification of Political Decisions

The legitimacy and acceptance of the Covid-19 measures are strongly connected to the reliable information of the public and the justification of political decisions. The discourse of the technocrats shall be clearly communicated, without noteworthy delays and misconceptions. The Greek government has been criticized for the lack of a sufficient notice period for new restrictions being introduced. No detailed rationale for the measures has been published and no public consultation procedures have been introduced. Most of the measures found their explanation in data and projections provided to the executive by the advisory health committee. Nevertheless, the pandemic has been in many ways similar to swimming in rough waters, as the unpredictable evolution of the epidemic curbs often caught the States unsuspecting. Long-term projections and designs have proven to be vain. Greek democracy and rule of law have not been threatened by the pandemic, in spite of the ongoing concerns about constitutional rights, but the dealing of the Covid-19 crisis and nowadays the vaccination policy reflect an encounter between the State and its citizenry and a challenge for our trust in political institutions.

